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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 741

W. E. MURPHY, Director of Alcoholic Beverage Control; JOHN ANDERSON, JR., Attorney General of the State of Kansas; ARDEN RHYNE, Sheriff of Leavenworth County, Kansas; and JAMES E. FUSSELL, County Attorney of Leavenworth County, Kansas,
Petitioners,

vs.

W. B. LOVE, an Individual Doing Business As THE LOVE TRANSFER COMPANY, Weston, Missouri,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

JOHN ANDERSON, JR.,
Attorney General of The State of Kansas,
State House,
Topeka, Kansas,
Counsel for Petitioners.

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Petitioners,

vs.

W. B. LOVE, an Individual Doing Business As THE LOVE TRANSFER COMPANY, Weston, Missouri,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on October 29, 1957.

CITATIONS TO OPINIONS BELOW.

The District Court did not issue a formal written opinion. The journal entry of the District Court appears in the record (Rec. 40). The majority and dissenting opinions of the Court of Appeals for the Tenth Circuit are set out in Appendix B.

JURISDICTION.

The judgment of the Court of Appeals entered on October 29, 1957, for which review is urged herein, is a final judgment.

The petitioners have no further remedy other than certiorari to this Court.

Jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED.

(1) Whether 4 U.S.C., §§ 105-110 (the Buck Act), a federal retrocession for certain state taxation purposes, permits the seizure of a shipment of liquor originating in Missouri to an individual residing on a federal military reservation in Kansas, by Kansas authorities on the basis of state liquor tax violations, notwithstanding the Commerce Clause of the United States Constitution?

(2) Whether 18 U.S.C., § 13, the Assimilative Crimes Act, adopts state regulatory measures which include criminal provisions?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are: (1) The Twenty-first Amendment, U. S. Const., Amend. XXI; (2) The Commerce Clause, U.S. Const., Art. I, § 8.

STATUTES INVOLVED.

The statutory provisions involved are Secs. 105-110 of the Buck Act, 4 U.S.C., §§ 105-110 (appendix A), and the Kansas Liquor Control Act (appendix A).

STATEMENT.

The respondent filed a petition in the Federal District Court for the District of Kansas requesting a mandatory injunction to prohibit the State of Kansas from interfering with shipments of intoxicating liquor to individuals residing on the Fort Leavenworth Military Reservation.

The jurisdiction of the District Court was predicated on the grounds of interstate commerce. The shipment in question originated in the state of Missouri.

W. B. Love (respondent) is an individual who does business as the Love Transfer Company of Weston, Missouri. The Love Transfer Company operates as a common carrier, licensed by the United States Government, the State of Kansas, and the State of Missouri (Rec. 35).

On October 5, 1955, agents of the Kansas Alcoholic Beverage Control intercepted one of respondent's trucks carrying a consignment of liquor (a total of 66 bottles) in route from the Austin Liquor Store of Beverly, Missouri, to the Federal Military Reservation, Fort Leavenworth, Kan-

sas. The shipment of liquor was consigned to Major B. C. Snow, Jr., who resided on the military reservation at Fort Leavenworth. The seized liquor was not marked or stamped with Kansas stamps, evidencing payment of the Kansas gallonage tax as required by Kansas G. S. 1949, 41-407 (app. A). The sales tax of the State of Missouri had been paid on the shipment (Rec. 38).

At the time the liquor was intercepted the driver of the truck, Richard Cooper Winburn, was arrested and taken with the seized liquor to the office of the Sheriff of Leavenworth County, Kansas. Winburn, the driver, was charged with the possession and the transportation of more than two (2) quarts of alcoholic liquor not bearing Kansas tax stamps in violation of Kan. G. S. 1949, 41-407. Winburn was arraigned and was awaiting trial in the District Court of Leavenworth County, Kansas, at the time the order of the Federal District Court granting respondent's requested injunction was entered. Winburn is presently at liberty under recognizance, awaiting final disposition of his case. The District Court in ruling on the request for the injunction entered as findings of fact (Rec. 39) that the shipment of alcoholic liquor involved in the instant case constituted an interstate shipment under the Commerce Clause of the United States Constitution (Finding No. 18); that no taxes were due or collectable by the State of Kansas on the liquor seized in the instant action (Finding No. 19); that the mandatory injunction prayed for in the complaint should issue under the seal of the Clerk of the Court (Finding No. 20); and that the liquor seized in the instant case should be returned by the United States Marshal to the petitioner. The Court below affirmed the rulings of the District Court (Bratton, C. J., dissenting) (app. B).

REASONS FOR GRANTING THE WRIT.

1. The Decision of the Court Below Raises a Novel Question, Not Previously Passed On by This Court Concerning the Inter-Relationship of the United States Constitution, Amend. XXI, the United States Constitution, Art. I, § 8 (the Commerce Clause), and 4 USC., §§ 105-110 (the Buck Act).

The effect of the Interstate Commerce Clause upon the Twenty-first Amendment appears to be clearly defined. *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383 (1944). (Transportation through a state for delivery to an area, within the boundaries of the state, which is under the exclusive jurisdiction of the United States *held* not to be a violation of laws prohibiting the importation into the state of intoxicating liquor.); *Duckworth* v. *Arkansas*, 314 U.S. 390 (1941) (state's confiscation of interstate liquor shipment upheld where the shipper had failed to post bond to insure prevention of diversion.) *Accord*, *Carter* v. *Virginia*, 321 U.S. 131 (1943).

This Court has not considered nor has research revealed consideration elsewhere of the effect of federal retrocession, through the Buck Act, upon established federal-state jurisdictional principles when the commodity involved in an interstate shipment is intoxicating liquor.

The Buck Act has received a liberal construction. *Howard* v. *Commissioners of Louisville*, 344 U.S. 624 (1953). The purpose of the Buck Act was to provide for uniformity in the administration of state sales and use taxes within and without federal areas. (Hearing Before a Subcommittee of the Committee on Finance of the Senate, 76th Cong., 3d Sess. on H. R. 6687 (Apr. 23, 1940). See also, S. Rep. No. 1625, 76th Cong., 3d Sess. 10429 (1940).

In the instant case the court below held that the tax imposed under the Kansas Liquor Control Act (Kan. G. S. 1949, 41-501) was "* * * a liquor sales tax within the meaning of the Buck Act." (app. B, p. 14). The legislature of Kansas by enacting the Kansas Liquor Control Act intended to tax and regulate intoxicating liquor within the state. *State* v. *Larkin*, 173 Kan. 112, 244 P.2d 686 (1952).

No question would have arisen concerning the validity of the state's seizure in the instant case if the liquor shipment involved had been consigned to a member of the armed services residing in the city of Leavenworth, Kansas, or any area over which Kansas exercised legislative jurisdiction. Kan. G. S. 1949, 41-407, prohibits transportation into the state, with certain exceptions not applicable herein, of unstamped liquor. Petitioners contend that the effect of the Buck Act was to dissolve the federal enclaves within Kansas permitting Kansas to apply certain tax laws to transactions previously insulated from state taxation. (This contention was adopted by Bratton, C. J.; dissenting.) Because of the absence of authoritative comment upon the inter-relationship of the Commerce Clause, the Twenty-first Amendment and the Buck Act petitioners contend that the decision below should be reviewed by this Court.

2. The Assertion of State Authority to Tax Liquor Shipments Originating Without the State, Consigned to Individuals Residing in Federal Enclaves, Raises Important Questions in the Area of Federal-State Relationships.

The national scope of federal-state jurisdictional conflicts arising out of the existence of federal enclaves is forcefully developed in the Report of the Inter-departmental Committee for the Study of Jurisdiction over Federal Areas Within the States (the Report) (Parts I and II,

April, 1956, June, 1957, U. S. Government Printing Office). The Committee publishing the report was formed December 15, 1954, on the recommendation of the Attorney General of the United States. The purpose of the Committee was to undertake a study with a view toward resolving problems arising out of the jurisdictional status of federally owned areas (Comm. Rep., Part I, p. VII). (Kansas, Virginia and California were the three representative states chosen by the Committee for extensive investigation.)

The Committee canvassed all of the State Attorneys General with reference to problems arising out of the existence of federal enclaves. The following excerpt from the Committee's report relates in part to alcoholic beverages:

> "*Other problems*—Numerous problems of criminal jurisdiction, licensing and control of alcoholic beverages * * * were mentioned by attorneys general as arising in areas under the legislative jurisdiction of the United States." (Comm. Rep. Part I, p. 27.)

The alcoholic beverage control question is also discussed in the Report at p. 45, Part I. Federal retrocession under the Buck Act is considered at pp. 186-203, Part II.

The question of the instant case, i.e., the applicability of the Buck Act to liquor shipments consigned to individuals residing within a Federal enclave is the concern of state officials in each state containing one or more federal areas. (Assuming that the state places a sale or use tax on intoxicating liquors.)

The national character of the problems arising out of "state liquor tax—federal enclave" situations is accented by the conflicts in the state and federal agency rulings noted below:

Georgia: 1952-3 Ops. Att'y Gen. 445 (1953):

> Taxes and warehouse charges may be collected on liquor shipped from without the state notwithstanding the fact that the liquor is consigned to persons located on a federal military reservation (Opinion based on the Buck Act).

Idaho: 1957 Ops. Att'y Gen. No. 14-6-7:

> Liquor may not be legally shipped to the Mountain Home Air Force Base from without the state unless the containers carry tax stamps of the Idaho State Liquor Dispensary.

The Attorneys General of three states have ruled that a state has no right to tax or regulate liquor imported into an exclusive federal jurisdictional area.

Missouri: Ops. Att'y Gen. (Apr. 26 (1936), Jan. 15, 1940, June 12, 1942).

Connecticut: Ops. Att'y Gen., Oct. 26 (1937).

Ohio: No. 1320 Ops. Att'y Gen. 2255 (1937) *id.* No. 3838 (1954), p. 265.

On the basis of the *Yellow Cab* case, *supra*, the Department of the Army has taken the position that a state has no authority to prohibit the importation of liquors destined for military reservations, Op. J.A.G., Army, 1954/5868 (July 12, 1954), or to require that the liquors so consigned be channelled through state warehouses and subjected to taxes and other charges, *id.* 1953/7206 (Sept. 15, 1953).

Several agency rulings concerning the intoxicating liquor-federal enclave problem appear to have been based upon *Collins* v. *Yosemite Park and C. Co.*, 304 U.S. 518 (1938). This Court held in *Yosemite Park* that a state cannot, with-

out express reservation of authority to do so, enforce in an area under federal legislative jurisdiction the regulatory features of its Alcoholic Beverage Control Act. The *Yosemite Park* holding has been interpreted by the Department of the Navy as authority for ruling that the provisions of the Virginia Beverage Control Act do not apply to sales on lands under the exclusive jurisdiction of the United States. Op. J.A.G., Navy, JAG: II: 1: RLB: imz (Nov. 5, 1952). The Department of the Army has expressed the view that state law pertaining to the methods of dispensing liquor and the various restrictions placed on tavern keepers have no application on areas over which the United States exercises exclusive jurisdiction. Op. J.A.G., Army, 414.1 (May 17, 1940) (Citations of the rulings set out herein are, in part, found in the Report of the Interdepartmental Committee, pp. 182, 183, Notes 12, 13, Part II).

The above opinions of the Attorneys General of Idaho and Georgia, upholding the authority of the state to tax liquor shipments into the enclave were written after Congress had effected a Federal retrocession through the Buck Act. The contra opinions were based either on *Yellow Cab* or the *Yosemite Park* case, *supra*, both of which were not Buck Act cases.

3. The Court Below in Holding That the Liquor Shipment Was Not Subject to the Kansas Liquor Tax Relied on Authorities of This Court Which in No Way Considered the Effect of Federal Retrocession under the Buck Act. Petitioners Contend That Because the Instant Case Is Inherently a Buck Act Case, Such Reliance Constitutes a Misinterpretation of the Decisions of This Court.

The court below commented that "in many respects the facts of this case (the instant case) are similar to those

in *Collins* v. *Yosemite Park and Curry Company*, 304 U.S. 518" (app. B, p. 15).

Petitioners acknowledge a degree of similarity between the cases. However, petitioners contend that the non-existence of the Buck Act at the time *Yosemite* was before this Court negates the use of the *Yosemite Park* case as persuasive authority in determination of the instant case.

The *Yosemite Park* case held that a reservation by California of the right to tax the sale of liquor did not include the right to enforce the regulatory features of California's Alcoholic Beverage Control Act in a national park. The *Yosemite Park* case was handed down on May 31, 1938. The Buck Act was not enacted until 1940. Act of Oct. 9, 1940, 54 Stat. 1059, 4 U.S.C. 105-110. The question of federal retrocession for taxation purposes was not before this Court in the *Yosemite Park* case.

The Court below also relied on *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383 (1944). Quoting from their opinion in *Yellow Cab*, the Court below commented that:

> "* * * the * * * 'state has no power to forbid the transportation in interstate commerce of intoxicating liquor through its territorial boundaries,' and that a state '* * * has no jurisdiction to require or grant permits for the importation of intoxicating liquors into * * *' a reservation." 137 F. 2d at 274 (app. B, p. 17).

Yellow Cab was not a Buck Act case. Federal retrocession pursuant to "The Buck Act", controls the disposition of the issues before this Court. By virtue of the retrocession of the Buck Act, the transportation in the instant case was *into* Kansas rather than *through* Kansas. The Buck Act was not applied in *Yellow Cab*. The distinction between *Yellow Cab* and the instant case is further pointed

up by the observation of Judge Bratton of the Tenth Circuit (concurring in *Yellow Cab*):

> "And by act of Congress, the United States consented that the several states be empowered to extend their income, sales, and use tax to federal areas within such states. 54 Stat. 1059, 4 U.S.C.A., §§ 13, 14. Aside from these exceptions, *none of which has any material bearing here*, the laws of Oklahoma as state laws do not have any force or effect within the Reservation." 137 F.2d at 278 (Emphasis supplied).

Petitioners contend that the cardinal issue in the instant case concerns the proper interpretation of the Buck Act. A determination of the instant case by the Court below in part on the authority of the *Yosemite Park* case and in part on the authority of *Yellow Cab* will not afford the degree of clarification required for the proper administration, within federal areas, of state liquor tax laws.

The Court below has held that the tax imposed by Kansas under the liquor control act was a tax within the meaning of the Buck Act (app. B, p. 15). *Howard* v. *Commissioners of Louisville*, 344 U.S. 624 (1953), was cited by the court as persuasive authority for such a holding.

In *Howard*, the plaintiffs were employees of the United States Naval Ordnance Plant located in an area of exclusive federal jurisdiction within the state of Kentucky. Plaintiffs sued in the state court for a declaratory judgment that a license tax on the privilege of working in the city of Louisville measured by a percentage of all salaries, wages and commissions earned within the city was not applicable to them. The defendants' demurrer was overruled and the collection of the tax enjoined. The Kentucky Court of Appeals reversed, 248 S.W.2d 340 (Ky. 1952), and judgment was entered for the defendants. The Court of Appeals then affirmed, 249 S.W.2d 816 (Ky. 1952). On

appeal to this Court, the Court of Appeals' decision was affirmed, two Justices dissenting.

The majority opinion in *Howard* constitutes a liberal construction of the Buck Act. To construe the Buck Act strictly would be to frustrate the intent of Congress. The liberal construction afforded to the Buck Act in the *Howard* case is indicative of the view the Court would take in construing the section of the act which applies to sales and use taxes (4 U.S.C., § 105).

The opinion below has created an anomalous situation, *i.e.*, (1) the Kansas tax on intoxicating liquor is within the meaning of the Buck Act, (2) the purpose of the Buck Act was to dissolve the enclave for certain taxation purposes, (3) the court below has characterized the instant shipment as one in interstate commerce. Petitioners contend that such a characterization is unfounded. If the Buck Act applies, and the court below held that it did, the enclave for certain taxation purposes is dissolved; consequently the shipment, lacking enclave protection, is into and not through Kansas.

Petitioners contend that federal-state jurisdictional conflicts arising out of the existence of federal enclaves should be considered in the light of present day realities.

This Court has observed and commented upon the dilution of the concept of exclusive federal legislative jurisdiction. In the *Howard* case, *supra*, Mr. Justice Minton speaking for the Court, stated:

> "• • • The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic.

Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed." 344 U.S. at 627.

Under the facts of the instant case the respondent is insulated from the effect of Kansas law merely because the consignee of the shipment resided within the federal enclave. The purpose of the Buck Act was to negate federal enclave preference. Under the opinion below the Buck Act applies and yet it does not apply. Petitioners contend that it was error for the court below to determine the instant case on the authority of decisions of this court in which the Buck Act was not considered.

4. For Purposes of Uniformity in the Administration of Criminal Laws Throughout the Individual States, the Assimilative Crimes Act, 18 U.S.C., § 13, Should Be Reviewed by This Court. The Effect of the Act upon Equitable Actions to Enjoin the Application of State Penal Measures to Individuals Associated with a Federal Enclave Should Receive Clarification.

Petitioners urged in the court below the applicability of the Assimilative Crimes Act (hereinafter referred to as the act) to the instant case. Petitioners' theory was based on the fact that the act adopts state law as federal criminal law when the Federal Criminal Code has not defined a certain offense or provided for its punishment. *United States v. Press Publishing Co.*, 219 U.S. 1 (1911). Under the act, illegal liquor traffic statutorily proscribed by the state of Kansas would also be illegal under the Federal Criminal Code. Consequently the federal district court, sitting in equity in the instant case should not have condoned an apparent violation of federal law by enjoining the state from seizing the liquor involved in the instant shipment.

A contention similar to the one petitioners urge herein was made in the *Yellow Cab* case, 321 U.S. 383 (1944).

This Court in *Yellow Cab* invalidated the seizure of liquor by Oklahoma on the basis that no state law purported to prohibit or regulate a shipment into or through the state to the enclave.

This Court left unanswered the question whether the act brought about an adoption of state law in the enclave which might have the effect of making illegal the transactions involved. Justices Frankfurter and Roberts, dissenting, were of the opinion that the act adopted state regulatory statutes for the enclave and made illegal the transactions involved in *Yellow Cab*.

It appears, however, that the opinion of the Court in *Yellow Cab* cannot be construed, in view of the clear language of avoidance used by the majority, as holding that the act does not apply to state regulatory statutes. This question remains unsettled.

> "Were we to decide that the assimilative crimes statute is not applicable to this shipment of liquors, we would, in effect, be construing a federal criminal statute against the United States in a proceeding in which the United States has never been represented. And, on the other hand, should we decide the statute outlaws the shipment, such a decision would be equivalent to a holding that more than 200 Army Officers, sworn to support the Constitution, had participated in a conspiracy to violate federal law." 321 U.S. at 391.

With reference to the act, the *Yellow Cab* decision merely held that, on the facts of the case, the carrier acted in good faith and neither the United States, the War Department, nor the army officers being represented in the litigation, relief would not be denied on the theory that federal laws may in consequence be violated.

At the time the respondent herein filed his petition requesting injunctive relief in the federal district court be-

low, proceedings concerning the seized liquor were pending in the District Court of Leavenworth County, Kansas, for violation of the "two-quart" law. Kan. G. S. 1949, 41-407 (app. A). The instant case therefore presents an entirely different problem from that in *Yellow Cab* with reference to the commission of a crime.

State criminal statutes in the nature of criminal regulations have been adopted under the act in *United States* v. *Watson*, 80 F. Supp. 649 (E. D. Va. 1948) (reckless driving), and *United States* v. *Sosseur*, 181 F. 2d 873 (7th Cir. 1950) (possession of slot machines). However, no reported decision appears to exist upholding the effectiveness, under the act, of a primarily regulatory statute containing criminal provisions.

Petitioners are aware that state law enforcement officials patently can not enforce the act's provisions. However, if state regulatory criminal provisions are applicable to the federal enclave by adoption under the assimilative Crimes Act, federal courts through the arm of equity should not be permitted to "aid in the consummation of what appears to be a violation of the criminal code of the United States." 321 U.S. at 393 (Mr. Justice Frankfurter, dissenting).

CONCLUSION.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN ANDERSON, JR.,
Attorney General, State of Kansas,
Counsel for Petitioner.

January 20, 1958.

APPENDIX A.

4 U.S.C., §§ 105-110.

§ 105. *State and so forth, taxation affecting Federal areas; sales or use tax.*—(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940 (July 30, 1947, ch. 389, § 1, 61 Stat. 641).

§ 106. *Same; income tax.*—(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940 (July 30, 1947, ch. 389, § 1, 61 Stat. 641).

§ 107. *Same; exception of United States, its instrumentalities, and authorized purchases therefrom.*—(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel, any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch. July 30, 1947, ch. 389, § 1, 61 Stat. 641, amended Sept. 3, 1954, ch. 1263, § 4, 68 Stat. 1227.

§ 108. *Same; jurisdiction of United States over Federal areas unaffected.*—The provisions of sections 105-110 of this title shall not, for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area (July 30, 1947, ch. 389, § 1, 61 Stat. 641).

§ 109. *Same; exception of Indians.*—Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed (July 30, 1947, ch. 389, § 1, 61 Stat. 641).

§ 110. *Same; definitions.*—As used in sections 105-109 of this title—

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency, of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State (July 30, 1947, ch. 389, § 1, 61 Stat. 641).

KANSAS LIQUOR CONTROL ACT (Ch. 41, Kansas G.S., 1949)

Article 1—GENERAL PROVISIONS

Article 2—ALCOHOLIC BEVERAGE CONTROL DIRECTOR AND BOARD OF REVIEW

Article 3—LICENSING AND RELATED PROVISIONS

Article 4—BONDED WAREHOUSES AND RELATED PROVISIONS

41-407. "*Evasion of liquor tax; acts forbidden; penalty.* It shall be unlawful for any person (1) to evade, or attempt to evade, the payment of tax or duty on any such

alcoholic liquor, in any manner whatever, and upon conviction thereof, in addition to the penalty prescribed for the violation of this act, such person shall forfeit and pay, as a part of costs in such action, double the amount of the tax so evaded or attempted to be evaded; (2) to have in his possession any cask or package of such liquor, without having thereon each mark and stamp required therefor by law; and such cask or package not having the mark or stamp as aforesaid, shall be forfeited to the state of Kansas; (3) to affix or cause to be affixed to or upon any cask or package containing or intended to contain such liquor, any imitation stamp or other engraved or printed stamp or photographed label, device or token, whether the same be designed as a trademark, caution, notice, caution, or otherwise, and which shall be in the similitude or likeness of, or shall have the resemblance or general appearance of any tax or revenue stamp required by the laws of the state of Kansas or the rules of the director to be affixed to or upon any cask or package containing such liquor; or (4) to remove from any bonded warehouse at any time other than after sunrise and before sunset any such liquor, or any cask or package containing such liquor: *Provided*, That nothing contained in this section shall make it unlawful for any person to possess or transport not to exceed two quarts of alcoholic liquor for the personal use of the possessor, his family and guests upon which the tax imposed by this act has not been paid or on the containers of which each mark and stamp required by this act has not been affixed: • • •" [The two quart exemption set out in the proviso was repealed in 1957 Kan. G. S., 1957 Supp. 41-407].

41-408. *"Common carriers authorized to carry liquor, when; bond; restrictions; exemptions.* Any common carrier of merchandise owning or operating any railroad, express company, bus truck or other transportation lines or

routes for the transportation of merchandise in the state of Kansas, upon application and filing of a bond in form and penalty and with such sureties as may be approved by the director, may be designated as a carrier of such alcoholic liquor, for the final release of which liquor, from a bonded warehouse in the state of Kansas, a permit has not been issued: *Provided*, The consignee shall be some manufacturer or distributor maintaining a bonded warehouse for such liquor within the state of Kansas; *And provided further*, That nothing in this section shall be construed to prevent or restrict any common carrier from transporting in intrastate commerce any such liquor without giving the bond aforesaid where the consignor is a bonded warehouse of the state of Kansas and the consignee is a licensed retail liquor dealer in this state. Any such liquor arriving at a point of entry in the state of Kansas may be entered, under such rules and regulations as the director may prescribe, for transportation in bond to any bonded warehouse in the state of Kansas."

Article 5—GALLONAGE TAX AND TAX STAMPS OR CROWNS

41-501: *"Manufacturers and wholesale distributors; rates of tax; exemptions; collection and disposition of tax.* (1) As used in this section, the word "gallon" means "wine gallon."

(2) For the purpose of raising revenue a tax is imposed upon the privilege of engaging in business as a manufacturer or as a distributor at wholesale at a rate of ten cents per gallon on all beer containing more than 3.2 percent of alcohol by weight; fifteen cents per gallon for wine and other dilute alcoholic beverages containing fourteen percent or less of alcohol, by volume; forty cents per gallon for wine and other dilute alcoholic beverages contain-

ing more than fourteen percent of alcohol by volume; one dollar per gallon on alcohol and spirits of one hundred proof or less; and two dollars per gallon on alcohol and spirits of more than one hundred proof manufactured and sold by such manufacturer or imported for sale in this state by such distributor at wholesale in the course of such business. Said tax shall be paid only once and shall be collected and paid to the director as provided in this act.

(3) Manufacturers or distributors at wholesale of alcoholic liquors shall be exempt from the payment of such gallonage tax imposed on such liquors, upon satisfactory proof, including bills of lading furnished to the director by affidavit or otherwise as the director may require, that such liquors were manufactured in this state but were shipped out of the state for sale and consumption outside the state of Kansas.

(4) Wines manufactured or imported solely and exclusively for sacramental purposes and uses shall not be subject to the tax provided in this section.

(5) The tax provided for by this section is not imposed upon any alcohol, or wine, whether manufactured in or imported into this state when sold to a "nonbeverage user", as defined in section 2 (41-102) of this act, licensed by the state for use in the manufacture of any of the following when they are unfit for beverage purposes: Patent and proprietary medicines and medicinal, antiseptic, and toilet preparations; flavoring extracts and syrups and food products; scientific, industrial and chemical products; or for scientific, chemical, experimental or mechanical purposes; nor is the tax imposed upon the privilege of engaging in any business of interstate commerce or otherwise, which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this state.

(6) The tax imposed by this section shall be in addition to all other occupation or privilege taxes imposed by the state of Kansas or by any municipal corporation or political subdivision thereof: *Provided*, That retail sales of alcoholic liquor and beer shall not be subject to the tax imposed by the Kansas retailer's sales tax act but shall be subject to the enforcement tax provided for in this act: *Provided further*, That notwithstanding any ordinance to the contrary, no city shall impose an occupation or privilege tax on the business of any person, firm or corporation licensed as a manufacturer, distributor, or nonbeverage user under this act and doing business within the boundaries of such city in any sum which exceeds the amount of the license fee required to be paid under this act to obtain such license; nor shall any city impose an occupation or privilege tax on any retailer licensed under this act in an amount in excess of the maximum amount specifically provided in this act.

(7) The director is hereby directed and authorized to collect the taxes herein imposed and to account for and turn over to the state treasurer at least once each week all money collected as herein provided and the state treasurer shall credit ninety percent (90%) of the same to the general fund of the state and the remaining ten percent (10%) shall be credited to the liquor control administration fund.

(8) If any alcoholic liquor manufactured in or imported into this state is sold to a licensed manufacturer or distributor of this state to be used solely as an ingredient in the manufacture of any beverage for human consumption, the tax imposed upon such manufacturer or distributor shall be reduced by the amount of the taxes which have been paid as to such alcoholic liquor so used under this act."

41-502. "*Tax stamps or crowns to be affixed to packages.* Payment of the tax provided for in section 53 shall be evidenced by tax stamps or crowns to be affixed to each original package of alcoholic liquor for use in this state. It is the duty of each manufacturer and distributor at wholesale before delivery of any alcoholic liquor to a licensed purchaser to affix a stamp or crown firmly to each original package at the rate of gallonage provided for in said section, in such amounts as the contents of each original package bears to one gallon, subject to all the conditions of sections 44 to 52 (41-401 to 41-409): *Provided*, That the director may, by rule, require that such tax stamps or crowns be affixed to each original package of alcoholic liquor at the place where such original package is manufactured or filled; *And provided further*, That the director may also, by rule, permit the cancellation of a tax stamp or crown by the distributor, and may permit credit replacement to be issued to such distributor for stamps or crowns so canceled or destroyed: *Provided*, That in the case of wine, the director may authorize such stamps to be affixed to the shipping container in lieu of the original package and if he shall so authorize, then the provisions of this act making it unlawful to possess, sell, deliver, distribute, transport or use alcoholic liquor upon the original packages of which such stamps shall not have been affixed or shall not be affixed, shall, in the case of wine, apply to the shipping containers and not the original packages."

Article 6—MANUFACTURER'S AND WHOLESALER'S RECORD AND REPORT

Article 7—CERTAIN PROHIBITED ACTS AND PENALTIES

Article 8—MISDEMEANORS AND NUISANCES

Article 9—GENERAL PENALTY PROVISIONS

Article 10—PROSECUTION AND ENFORCEMENT

Article 11—MISCELLANEOUS PROVISIONS

Article 12-26—(BLANK)

Article 27—CEREAL MALT BEVERAGES

APPENDIX B.

Opinion of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

September Term, 1957

W. E. MURPHY, Director of Alcoholic Beverage Control; JOHN ANDERSON, JR., Attorney General of the State of Kansas; ARDEN RHYNE, Sheriff of Leavenworth County, Kansas; and JAMES R. FUSSELL, County Attorney of Leavenworth, County, Kansas,
Appellants,

vs.

W. B. LOVE, an individual doing business as the LOVE TRANSFER COMPANY, Weston, Missouri,
Appellee

} Number 5585

Appeal From The United States District Court
For The District of Kansas

John Anderson, Jr., Attorney General, and Eugene W. Davis, Counsel for Alcoholic Beverage Control (Paul E. Wilson, Ass't Attorney General, and Fred N. Six, Ass't Attorney General, were with them on the brief) for Appellants:

Homer Davis for Appellee.

Before BRATTON, Chief Judge, and HUXMAN and BREITENSTEIN, United States Circuit Judges.

HUXMAN, Circuit Judge.

This is an appeal from a mandatory injunction issued by the United States District Court for the District of Kansas permanently and perpetually enjoining and restraining appellants from interfering with appellee Love in the transportation of liquor from Missouri to the Fort Leavenworth Military Reservation, and for the return of liquor seized from Love by appellants. Jurisdiction is predicated on the ground that interstate commerce is involved.

On October 5, 1955, Agents of the Kansas Alcoholic Beverage Control intercepted at the western approach of the new Municipal Leavenworth Toll Bridge a truck owned by Love which was carrying 66 fifths of alcoholic liquor consigned from the Austin Liquor Store at Beverly, Missouri, to Major B. C. Snow, Jr., residing on the Military Reservation at Fort Leavenworth. The liquor was not marked or stamped with Kansas revenue stamps evidencing payment of the Kansas gallonage tax, but was stamped evidencing proper payment of Missouri gallonage tax and Missouri sales tax. The liquor was purchased by the consignee from the Austin Liquor Store in Beverly, Missouri, and was delivered to the common carrier for transportation to consignee's residence on the Military Reservation.

Subsequent to the seizure, Love filed his petition in the Federal Court, requesting a mandatory injunction to enjoin and restrain appellants from further interfering with such liquor shipments to Fort Leavenworth and for the return of the seized liquor. Trial was had to the Court. At the conclusion of the trial, the Court made detailed

findings of fact and conclusions of law and, based thereon, entered the judgment challenged in this appeal.

Many of the Court's findings of fact are not challenged and need not be considered. The pertinent findings and conclusions of law necessary to consider are as follows: The Court found:

> No. 14. That the arrest and seizure took place at a point within the jurisdiction of the State of Kansas.
>
> No. 18. That the shipment in question constituted an interstate shipment under the Commerce Clause.
>
> No. 19. That no taxes were due or collectible by the State of Kansas on the liquor seized and involved in this action.

Based upon these findings, the Court concluded as a matter of law:

> No. 2. That the arrest and seizure took place within the jurisdiction of Kansas.
>
> No. 3. That the seizure constituted an interference with and a burden upon an interstate shipment and was without legal authority.
>
> No. 4. That the State of Kansas or its agents have no authority to levy or collect any tax on the liquor seized.

Eight assignments of error are urged for reversal, but in the main they present but one central question, and that is whether Kansas was empowered to stop this interstate shipment of liquor from Missouri to the Fort Leavenworth Military Reservation because the shipment did not have attached Kansas liquor revenue stamps. It is without dispute that military reservations, such as we have here, are separate entities and do not constitute a part of the state in which they are located for general jurisdictional pur-

poses.[1] So also it must be conceded that the seizure of this shipment is an interference with interstate commerce and constituted a burden thereon which the State may not impose, absent statutory authority authorizing the same.

Kansas does not by statute prohibit the importation of liquor into the State and, of course, may not prohibit the transportation in interstate commerce of intoxicating liquor through its territorial boundaries. Under reasonable regulations and for permissible purposes, it may control the interstate transportation of liquor through its territorial boundaries.[2] Whether it has done this is the crux of this case and requires a consideration of the Kansas Liquor Control Act of 1949.[3]

The Kansas Liquor Control Act sets up a comprehensive scheme for liquor control from the time of manufacture or importation into the State to the ultimate sale at retail and also provides for the collection of revenue thereon. The provisions necessary for consideration may be generally summarized as follows: The statute provides for the licensing of distributors and retailers and provides that a licensed distributor may sell only to another licensed distributor or to a licensed retailer; that no distributor may sell or deliver alcoholic liquor other than to a person authorized to receive the same; and that no licensed retailer may purchase or receive alcoholic liquor from any source except from a licensed distributor, having a place of busi-

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[1]*Pacific Coast Dairy* v. *Dept. of Agriculture of California*, 318 U.S. 285; *Surplus Trading Co.* v. *Cook*, 281 U.S. 647; *Benson* v. *United States*, 146 U.S. 325; *Ft. Leavenworth RR. Co.* v. *Lowe*, 114 U.S. 525.

[2]*Johnson* v. *Yellow Cab Co.*, 321 U.S. 383; *Carter* v. *Virginia*, 321 U.S. 131; *Duckworth* v. *Arkansas*, 314 U.S. 390.

[3]G.S. 1949, Chapter 41, as amended.

ness in Kansas.[4] Section 41-501 of the Act provides that for the purpose of receiving revenue a tax is imposed on the privilege of engaging in business as a manufacturer or as a distributor at wholesale.[5]

Whether Kansas under the above statute may collect a liquor tax on alcoholic beverages bought and sold on the Reservation requires first a consideration of the Act of the Kansas Legislature ceding jurisdiction over the Fort Leavenworth Military Reservation to the Federal Government and secondly of the Buck Act.[6] It is well established by the decisions that a State may attach reservations to an Act ceding territory to the Federal Government and may thereafter exercise the Governmental functions so reserved on such territory.[7]

By Chapter 66 § 1 of the Laws of 1875, Kansas ceded exclusive jurisdiction of the Fort Leavenworth Military Reservation to the United States, reserving only the right to serve criminal and civil process thereon and also reserving the right "to tax the property and franchises of any railroad, bridge, or other corporations within the boundaries of such lands." Looking to the ceding act, no rights were reserved to levy or collect such taxes as are involved herein.

If such power exists, it must be sought and found in the Buck Act of 1940. Section 105(a) of the Act gives the state the right to levy and collect sales and use taxes with

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[4]The Act contains like provisions applying to wholesalers or manufacturers.

[5]The tax levied is a gallonage tax and varies with the different kinds of liquor.

[6]4 U.S.C.A., § 105, *et seq.*

[7]*Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518; *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525; *Arlington Hotel Company v. Fant*, 278 U.S. 439; *United States v. Unzeuta*, 281 U.S. 138.

respect to the sale or use of property where the transactions in whole or in part occurred on a reservation. Section 110(b) provides that "The term 'sales or use tax' means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property * * *." Appellee makes a strong argument, and not without some basis therefor, that the Kansas Liquor tax does not fall within this definition. It is pointed out that by the plain language of the statute the tax is a privilege tax for the privilege of doing business and is, therefore, not one of the taxes the State may collect under the Buck Act.

It is true that the Kansas Act specifically states that the "tax is imposed upon the privilege of engaging in business as * * *" a distributor of liquor. Why Kansas saw fit to state that the liquor tax was a privilege tax for the privilege of doing business is not clear. It is apparent, however, that the tax is a revenue tax. It is so described. It is also clear that it is levied with respect to sales and the amount of tax due is measured by the amount of liquor sold. It is not a retail liquor tax since it is not exacted from the retail purchaser of liquor. It is exacted only from the distributor. He alone must pay the tax. In fact, so far as this case is concerned, he is the only one who can pay it. But it is immaterial whether it is a retail sales tax or a distributor's liquor sales tax. It is in our opinion a liquor sales tax within the meaning of the Buck Act.

With respect to the designation of the Kansas tax as a privilege tax the case in many ways is similar to *Howard* v. *Commissioners*, 344 U.S. 624, where the question was whether a City of Louisville tax, called an occupation tax, was nonetheless an income tax, bringing it within the provisions of the Buck Act. For taxing purposes, the City of Louisville sought to levy an occupation tax measured by

earnings upon employees employed upon a federal enclave within the City of Louisville. The Supreme Court held that the tax was an income tax, measured by the amount of income, notwithstanding its designation as an occupation or privilege tax and was, therefore, collectible under the Buck Act.

We agree with appellants' contention that a gallonage tax may under the Buck Act be imposed upon liquor shipments to persons residing on the Military Reservation and collected from them. The difficulty is that Kansas has not by statute or regulation provided for the collection of liquor taxes with respect to liquor purchased on the Reservation, or purchased in states other than Kansas, and shipped in interstate commerce to the purchaser on the Reservation. Kansas does not seek to collect a tax from the purchaser of this liquor. In fact, it concedes that under its law there is no way in which the purchaser could pay the Kansas tax. The effect of what it seeks to do by its laws and regulations is to stop entirely all interstate transportation of liquor to inhabitants of the Reservation and force them to come into Kansas and buy all liquor, to be consumed on the Reservation, from a licensed retail liquor dealer in Kansas. It is one thing to say that Kansas may by statute and regulations promulgated thereunder provide for the collection of its liquor tax on liquor going to the Reservation or sold on the Reservation. It is quite another thing to say that it may control or regulate the purchase of liquor on the Reservation or to entirely prohibit shipment in interstate commerce of liquor purchased outside Kansas for delivery to the Reservation.

In many respects the facts of this case are similar to those in *Collins* v. *Yosemite Park and Curry Company*, 304 U.S. 518. Involved there was the Yosemite National Park enclave in California. The State Act ceding the enclave ter-

ritory to the Federal Government reserved "the right to tax persons and corporations, their franchises and property on the lands included in said parks." California's Liquor Control Act was much like that of Kansas, in that it required licensed wholesalers and retailers and the purchase of liquor stamps by them. California sought to compel liquor operators in the Park to take out licenses and pay license fees. The Supreme Court pointed out that since all California reserved was the right to collect taxes it had no power to subject business done in the Park to the regulatory provisions of its Liquor Control Act. The Court held that California had the right to use means to force a collection of any tax due on transactions carried on in the Park but held that "* * * it seems clear that the licenses required by § 5 go beyond aids to the collection of taxes and are truly regulatory in character." The Court further said, "As there is no reservation of the right to control the sale or use of alcoholic beverages, such regulatory provisions as are found in the Act under consideration are unenforceable in the Park."

The Act of 1875 ceding the Fort Leavenworth Military Reservation to the United States did not reserve the right to control or regulate business on the Reservation. The Buck Act does not give the State such power. Under it at most the State can collect taxes on liquor sold to or on the Reservation. The Buck Act gave the State no right to regulate or control business done in interstate commerce with persons on the Reservation. All such power remained in the Federal Government. 4 U.S.C.A., § 109, specifically provides that Sections 105 to 110 shall not otherwise [than for the collection of taxes] deprive the United States of its exclusive jurisdiction over the Reservation.

Kansas may by statute and appropriate regulations provide for the collection of liquor taxes due under its laws

and collectable under the Buck Act on liquor sales to or on the Reservation. Such laws or regulations would not constitute an unreasonable burden upon interstate commerce. But, as pointed out, Kansas has not done this since its laws provide that the tax may be paid only by persons who are regulated under the Kansas Act.* Since Kansas does not have territorial jurisdiction to regulate liquor in the Federal enclave it has no authority to impose revenue measures concerning liquor which are inseparable from such regulatory aspects of the Act. The effect of what it seeks to do by the regulatory provisions of its law is to make impossible the purchase or sale of liquor on the Reservation, or importation of liquor in interstate commerce into the Reservation. Such a construction would not only place a burden on interstate commerce of liquor to the Reservation but would stop it entirely. In *Johnson* v. *Yellow Cab Transit Company*, 137 F.2d 274, we said that the "* * * state has no power to forbid the transportation in interstate commerce of intoxicating liquor through its territorial boundaries," and that a state "* * * has no jurisdiction to require or grant permits for the importation of intoxicating liquors into * * *" a reservation.

The contention that injunctive relief should be denied because appellee came into Court with unclean hands needs no extended discussion. It is argued that the Assimilative Crimes Act makes the criminal provisions of the Kansas Liquor Control Act applicable to military reservations and hence the issuance of the injunction aids in the commission of a violation of the Criminal Code of the United States. Since there is no state law prohibiting the importation in interstate commerce of liquor into the Reservation, there is no violation of a Kansas criminal statute. At most

*See G.S. 1949, 41-504.

there was a violation of the provision making it unlawful to have possession in Kansas of liquor not bearing the Kansas revenue stamps. But liquor passing across Kansas in interstate commerce does not come to rest in Kansas and, therefore, the law making it unlawful to have in possession in Kansas liquor without Kansas revenue stamps attached thereto has no application to such shipments.

AFFIRMED.

NUMBER 5585

BRATTON, Chief Judge, dissenting:

The Twenty-first Amendment to the Constitution of the United States, and the Act of August 27, 1935, 49 Stat. 877, 27 U.S.C.A., § 122, each prohibit the transportation or importation of intoxicating liquor into a state in violation of the laws of such state. A state is free to forbid the importation of intoxicating liquor in interstate commerce into its territorial boundaries, or it may enact regulatory provisions for such importation. *State Board* v. *Young's Market Co.*, 299 U.S. 59; *Mahoney* v. *Triner Corp.*, 304 U.S. 401. And exercising its prerogatives in that field, the State of Kansas in 1949 enacted a liquor control act. Chapter 41, General Statutes of Kansas, 1949. The purpose of the act was to regulate and tax the manufacture, sale, possession, and transportation of intoxicating liquor within the state. *State* v. *Larkin*, 173 Kan. 112, 244 P. 2d 686.

The act imposes a gallonage tax upon intoxicating liquor. Payment of the tax is evidenced by tax stamps or crowns to be affixed to the original package, K.G.S., 1949, § 41-502. It is unlawful for a person to have liquor in his possession without the stamp thereon required by law; but one may possess or transport not to exceed two quarts for the personal use of the possessor, his family, and his guests

§ 41-407. A common carrier is not permitted to transport into the state liquor upon which the tax has not been paid, except for delivery to manufacturers, dealers, or jobbers who maintain a bonded warehouse within the state § 41-408. And under the act, particularly § 41-407, unstamped liquor is prima facie contraband subject to seizure and confiscation. Therefore it is clear that if the non-tax-paid shipment in question had been consigned to an individual in Kansas outside of the military enclave of Fort Leavenworth it would have been subject to seizure after coming into the state and before being delivered to the consignee.

The shipment in question was moving to a consignee residing within the military enclave of Fort Leavenworth. And, except as modified by statute, the area within the enclave is under the exclusive jurisdiction of the United States. But it is provided by Act of Congress commonly referred to as the Buck Act that no person shall be relieved of liability for payment of, collection of, or accounting for any sales or use tax levied by any state having jurisdiction to levy such tax on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and that such state shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such state to the same extent and with the same effect as though such area was not within a Federal area. 4 U.S.C.A., § 105. By such act, Congress effected a recession of jurisdiction to the State of Kansas in respect to the laying and collecting of use taxes. With such recession of jurisdiction in effect, the laws of Kansas in respect to the levying and collecting of use taxes upon liquor and in respect to the possession or transportation of liquor upon which the tax has not been paid are in force and effect within the enclave at the fort to the same extent as in other parts of the state. *Howard* v. *Com-*

missioners, 344 U.S. 624; *Commissioners of Sinking Fund* v. *Howard*, 248 S.W.2d 340; *Howard* v. *Commissioners of Sinking Fund*, 249 S.W.2d 816.

The case of *Collins* v. *Yosemite Park and Curry Co.*, 304 U.S. 518, was decided before the enactment of the Buck Act and therefore is without persuasive application here. The case of *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, was decisively different from this one and does not have the effect of immunizing this shipment of liquor from seizure and confiscation. There, a shipment of liquor was moving from Illinois, through Missouri, into Oklahoma, and thence to a consignee within the military reservation of Fort Sill. But Oklahoma was a dry state. It prohibited the sale of liquor, except for medical purposes. It had no law regulating the taxing or control of liquor within the state. Liquor in Oklahoma was not subject to any state tax. And therefore the Buck Act was completely inapplicable. And the case of *Miller Brothers Co.* v. *Maryland*, 347 U.S. 340, upon which appellee places strong reliance, fails to lend effective support to the judgment of the court below. There, Maryland sought to assert a use tax against a merchant engaged in business in Delaware. Sales of merchandise were made in Delaware to purchasers in Maryland. In some instances, the purchasers received the merchandise at the store in Delaware and transported it into Maryland. In some instances, the deliveries were made by common carrier. But in all instances, the sales were made at the store in Delaware. It was held that the merchant in Delaware was not liable for the use tax under the law of Maryland. The basis for the holding was that the practical and legal effect of the contention of Maryland was to make the vendor in Delaware liable for a use tax due from the purchaser. Here, Kansas was not asserting a use tax against the carrier. It was not attempting to collect a tax from the carrier. It was engaged

in the enforcement of its law in forbidding and making penal the possession and transportation of liquor upon which the tax had not been paid.

It is my view that after the truck passed from Missouri into Kansas, the liquor being transported without the stamps or crowns attached to the original containers or packages as required by the law of Kansas became contraband subject to seizure and confiscation.

I would reverse the judgment.

Judgment of United States Court of Appeals (Tenth Circuit).

Thirty-Third Day, September Term, Tuesday, October 29th, 1957.

Before Honorable Sam G. Bratton, Chief Justice, and Honorable Walter A. Huxman and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

On December 3, 1957, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.